

VZCZCXRO9993
PP RUEHDBU
DE RUEHKV #1195/01 1381512
ZNY CCCCC ZZH
P 181512Z MAY 07
FM AMEMBASSY KYIV
TO RUEHC/SECSTATE WASHDC PRIORITY 2367
INFO RUEHZG/NATO EU COLLECTIVE
RUCNCIS/CIS COLLECTIVE
RUEHLMC/MILLENNIUM CHALLENGE CORP WASHDC

C O N F I D E N T I A L SECTION 01 OF 04 KYIV 001195

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E.O. 12958: DECL: 05/18/2017

TAGS: [PGOV](#) [PREL](#) [UP](#)

SUBJECT: UKRAINE: BALOHA SUGGESTS THAT TIME RUNNING OUT FOR
POLITICAL COMPROMISE

REF: KYIV 001180

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Classified By: Ambassador for reasons 1.4(a,b,d).

11. (C) Summary. Head of the Presidential Secretariat Baloha told the Ambassador that there were now two options on the table for a political compromise: either on Monday, May 21, the President, PM and their teams would announce the date for early elections and the contents of the legislative package to be passed immediately afterwards, or, if there was no agreement, the President's team would move to Plan B and call a May 23 National Security and Defense Council (NSDC) meeting, during which the President would unilaterally decree a new election date, followed by the resignations of all Our Ukraine and BYuT deputies to put the Rada out of business. According to Deputy Presidential Secretariat Head Chaliy, the President and PM met for four hours on May 17, and on May 18, EU Foreign Policy chief Solana had telephoned Yushchenko to urge resolution of the standoff. The Working Group continues to meet as well. The Kyiv rumormill had targeted a scheduled May 18 meeting of the National Security and Defense Council (NSDC) as the next likely showdown between President Yushchenko and Prime Minister Yanukovych--with talk that the President would try to dismiss the Government or declare a state of emergency--but the meeting was canceled at the last minute. Current and former members of Yushchenko's national security team told us privately that such plans were unconstitutional and beyond the pale, and indicated that Chief of Staff Baloha was now the only stream of information reaching the President. Meanwhile, a reinvigorated Constitutional Court went back into session--assigning consideration of Yushchenko's second decree to a judge nominated by the Communists, recognizing recently-fired Judge Pshenychniy as the Acting Chairman, and approving the resignation of Judge Dombrovskiy as Chairman of the Court.

12. (C) Comment. We've been down this road before and it is not yet clear that the President and Prime Minister will succeed in sealing the deal on a political compromise on May 121. One thing that is now clear is that the President's team has already made up its mind that it will not recognize or honor any decision of the Constitutional Court; as Baloha told the Ambassador, we are no longer seeking both a political and a legal compromise, only a political agreement. The last minute cancellation of the NSDC meeting suggests that the threats of a drastic step may have been a negotiating tactic, but were never intended to be implemented. On the other hand, Yushchenko could have simply backed off from what would have been a blatantly undemocratic move. It is clear that there is frustration among members of the Yushchenko team who are not in the inner circle that Baloha is pushing the President in a destructive way. The Court's actions, all taken on a day when Yushchenko's three

nominees were absent, give credence to the comments Yanukovych made to the Cabinet on May 16--that he expects a favorable ruling in the near future. End summary and comment.

Baloha Outlines the Plan Ahead

13. (C) Fresh from a meeting with President Yushchenko, Baloha began a May 18 meeting with the Ambassador defensively, arguing that since the President and PM's May 4 agreement to hold pre-term elections, announced publicly by both sides, Yushchenko had not taken any steps that violated this agreement in any way. Baloha claimed that since May 14, Yushchenko and Yanukovych had met three times (most recently May 17) and that the PM had started seeking other ways than pre-term elections to resolve the political standoff. According to Baloha, there had been no misunderstandings about the May 4 deal -- both sides had agreed that there would be pre-term elections and both had agreed that the Working Group should deal with the issues of establishing a date for the elections and agreement on the necessary legislative documents to be concluded by the Rada as part of a political deal. (Note: Baloha also confirmed that the President's team was committed to including necessary WTO legislation, passage of the bill on military exercises and amendments to the budget that would include funding for the election, increased social benefits and the work of Ukraine's MCC team. End note.) In Baloha's view, the only issue left was the date of the early elections. The subject of the discussion was now focused on finding the legal solution for agreement on an election date, acceptable to both the President and the PM.

14. (C) Baloha said that there were now two options on the table for the President's team. The first, the positive scenario, was that on May 21, the President, PM and their teams would gather in the President's office at 1 pm and

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reach agreement on an election date. They would then go to the Rada on Tuesday, May 22, and vote on the minimum package of legislation required to begin the pre-election campaign and all other draft legislation included in the package. In Baloha's view, all the legislative decisions would be taken by week's end and there would be no bargaining. At that point, all the players would congratulate each other and Ukrainian institutions for having come through the crisis.

15. (C) Baloha's second scenario was the negative flip side. If there was no agreement by May 21, the President would convene an NSDC meeting on May 23 to discuss the situation. Then on May 24, 165 Rada deputies from BYuT and OU would begin the process of resigning from their factions in order to deprive the Rada of a quorum. In Baloha's assessment, this would mean that the Rada would automatically cease to exist. The President would then simply decree the date of the preterm elections and the Central Election Commission would begin its work in earnest. In response to the Ambassador's direct question, Baloha confirmed that in this scenario, although the Rada would be out of business, the PM and the Cabinet would continue to function in acting status until the elections took place and a new coalition was formed. Baloha stressed that all of this would be done in a "purely constitutional way."

16. (C) Comment. Although Baloha argued that option 2 was completely constitutional, the actual text of the constitution is less clear about what happens to the Rada in the case of a lack of quorum. According to Article 82, "the Verkhovna Rada of Ukraine is competent on the condition that no less than two-thirds of its constitutional membership has been elected." Following the second option would clearly lead to constitutional and legal challenges. End Comment.

¶17. (C) The President's team, especially Deputy Head of the Presidential Secretariat Chaliy, had floated the idea that they might be forced to take drastic measures at an NSDC meeting scheduled for May 18 if they did see progress from the Yanukovych team before then (reftel). Yushchenko even alluded to such a possibility in a May 16 speech. Among the possible outcomes whispered about were that Yushchenko would try to dismiss the government or declare a state of emergency. Former NSDC Secretary Haiduk told Ambassador May 17 that he had heard that Yushchenko was considering dismissing the Yanukovych Government and also might dismiss members of the Central Election Commission and possibly add all 24 governors, who are presidential appointees, to the NSDC. Dismissing the Cabinet, in his view, was blatantly unconstitutional. SBU Chief Nalyvaichenko told Ambassador that Baloha, former OU head Bezsmertniy, and erstwhile Yushchenko financial backer Zhvania were meeting in the President's office each morning to plan their activities. Their current plan to get rid of the Yanukovych government and call new elections was to have a former minister bring a suit against the Yanukovych government alleging it to be illegitimate; a friendly court would agree and the Yekhanurov government would be reinstated. All of this was totally unconstitutional, according to Nalyvaichenko.

¶18. (SBU) However, at the last minute the NSDC meeting was canceled. NSDC Secretary Plyushch told the press that he had recommended that the meeting be postponed until the working group was finished with its compromise package, so that the NSDC members would have something concrete to vote on.

NSDC Strategy Criticized

¶19. (C) Acting SBU Chief Nalyvaichenko, Defense Minister Hrytsenko, and former NSDC Secretary Haiduk all told Ambassador separately on May 17-18 that using the NSDC to further Yushchenko's side in the struggle with Yanukovych--either by declaring a state of emergency, dismissing the government, or simply decreeing the election forward--was at a minimum a terrible idea and at worst unconstitutional and undemocratic. Hrytsenko said that using the NSDC in this manner was "crazy." Haiduk said that the NSDC is supposed to be advisory council for the President, not his political machine. Nalyvaichenko and Haiduk both argued that Yushchenko has been occupying two roles--that of leader of the country or guarantor of the constitution, but also leader of the opposition. Haiduk said that Yushchenko cannot negotiate in good faith and occupy both roles, therefore Yushchenko flip-flops.

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¶10. (C) Haiduk expressed his frustration with the amount of pressure on the NSDC to become more political. He said that he could not rule out that more Deputy Secretaries of NSDC would resign in protest if asked to do something unconstitutional, as he and First Deputy Secretary Khoroshkovskiy had just done. He also thought Chaliy might if pushed too far. (Embassy Note. On May 18, Chaliy confirmed to the Ambassador that he would resign if the President decided to cross the red line of asking for a state of emergency or dismissing the government. End Note.) Haiduk said that Yushchenko has one source of information now, Baloha; Haiduk had been a dissenting opinion, but Baloha et al could not tolerate this. He cited the examples that Yushchenko refused to consult any experts about his April 2 and 26 decrees other than Shapoval and that Yushchenko's negotiating team in the working group is all representatives of OU and BYuT. The President, Haiduk argued, is not hearing from neutral figures outside the opposition camp.

¶11. (C) Haiduk also shared the blame for the political crisis with Yanukovych and the coalition, arguing that they provoked

the crisis in their grab for 300 MPs. Prior to May 16, Haiduk said he had hoped that an agreement would be reached, but Yanukovych's comments at CabMin meeting on May 16 showed that he was rejecting the old agreements with Yushchenko. Haiduk had known Yanukovych for a long time--the PM was always very careful with his words, and it was clear that he was expecting a favorable CC ruling, maybe a cancellation of the decree and early elections, soon, something he can use to increase pressure on the President.

¶12. (C) Comment. It is interesting that three senior members of the Yushchenko team--none of whom are in the President's inner circle--expressed such uniform opinions, even sometimes using the same phrases. It is clear that presidential people not close to Baloha think the Chief of Staff is leading Yushchenko down a bad path.

Tymoshenko: Coming Out Ahead

¶13. (C) Haiduk told Ambassador that he had just talked to Tymoshenko and she clearly understands that a summer election is inappropriate and that September is better. However, as the opposition leader, she is pushing for as much as she can get, which was normal. Her position was solid--sooner or later she will get an election and all the negatives-- the accusations of violating democracy, etc.--will fall on Yushchenko's head. Nalyvaichenko opined that Yanukovych and Tymoshenko would likely team up next year to find a way to have presidential elections.

Constitutional Court: Back in Session

¶14. (C) The controversy heightened around the Constitutional Court May 17-18, as it once again took up consideration of Yushchenko's decrees. On May 17, the Court's press service first announced that Chairman Dombrovskiy had resigned his chairman position, although he seems to have retained his seat as a judge. Shortly thereafter, the Court press service announced that Dombrovskiy's deputy, Judge Pshenychniy, would replace him as Acting Chairman, even though Pshenychniy was one of the three judges fired by Yushchenko in late April/early May. Judge Shyshkyn a Yushchenko appointee, told a USAID implementer that Dombrovskiy had not removed Stanik, Pshenychniy, and Ivachenko from the Court's access list after they were dismissed, permitting them unobstructed entry into the court. The three judges cited a May 17 Luhansk local court decision reinstating them as the reason. (Note. This is the second local court to reinstate them. A Donetsk court took the same step on May 14, but the decision was suspended by a Donetsk appellate court. It is highly unlikely that any of these courts has jurisdiction in the case. End note).

¶15. (C) The Court also announced that it was now considering Yushchenko's April 26 decree and that the reporting judge would be Maria Markush, a judge nominated by the Communists on the Rada's quota. Judge Shyshkyn a Yushchenko appointee, told us privately on May 17 that all three Yushchenko appointees were out of the Court on May 17, meaning they were absent for the decisions regarding Dombrovskiy's resignation, Pshenychniy's promotion, and assigning the new case to Markush. Baloha told the Ambassador that given the current CC composition, the President and his team would not recognize any CC decision as valid. Therefore, there was no reason to look for a legal agreement; only a political compromise would resolve the situation. Members of OU have also announced that they no longer recognize the Court as valid and have called for all the judges to be replaced.

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¶16. (U) Visit Embassy Kyiv's classified website:
www.state.sgov.gov/p/eur/kyiv.
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